CASE NO. 82–859

Supreme Court, U.S.
F I L E D
JAN 14 1983

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

R. C. MARSHALL, Superintendent,
Southern Ohio Correctional Facility,
Petitioner,

v.

JIMMY LEE CLARK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

TABLE OF CONTENTS

Page

REPLY ARGUMENT IN SUPPORT OF CERTIORARI. 1
CONCLUSION 6
CERTIFICATE OF SERVICE. 7

TABLE OF AUTHORITIES

Cases:

Burton v. Bergman,
649 F. 2d 428 (6th Cir. 1981), *vacated,*
_____U.S._____, 72 L. Ed 2d 478 (1982) 5

Edwards v. Arizona,
451 U.S. 477 (1981) 3,4

Sandstrom v. Montana,
442 U.S. 510 (1979) 5

Sumner v. Mata,
449 U.S. 539 (1981) 1,2,4

Statutes:

28 U.S.C. Section 2254(d) 2

REPLY ARGUMENT IN SUPPORT OF CERTIORARI

I. WHETHER 28 U.S.C. SECTION 2254(d) MANDATES THAT A FEDERAL COURT REVIEWING A STATE PRISONER'S HABEAS CORPUS PETITION AFFORD DEFERENCE TO FACTUAL DETERMINATIONS MADE BY THE STATE JUDICIARY WHERE REFERENCE TO THE TOTALITY OF THE STATE COURT RECORD DEMONSTRATES THAT THE STATE COURTS APPLIED THE CORRECT CONSTITUTIONAL STANDARD IN ARRIVING AT SUCH FACTUAL DETERMINATIONS.

In *Sumner v. Mata*, 449 U.S. 539 (1981), this Court stated:

> In order to ensure that this mandate of Congress is enforced, *we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude* that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record." Such a statement tying the generalities of Section 2254(d) to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the "boilerplate" language to which we have previously adverted. Moreover, such a statement will have the

> obvious value of enabling courts of appeals and this Court to satisfy themselves that the congressional mandate has been complied with. *No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of Section 2254(d).* *Id.* at 551-552 [Emphasis added].

The circuit court below held that the "total absence of fact finding" (A-23) by the state judiciary made 28 U.S.C. Section 2254(d) inapplicable. In his brief in opposition to certiorari, respondent candidly concedes that the circuit court holding that there was a "total absence of fact finding" by the Ohio courts is patently incorrect.[1]

It is thus undisputed that the court below did not comply with either the Congressional mandate of 28 U.S.C. Section 2254(d) or the directives of this Court. This Court is thus ". . .left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of Section 2254(d)." *Sumner v. Mata, supra* at 552.

Notwithstanding the obvious failure of the circuit court to follow the admonistion of this Court, respondent endeavors to avoid review by urging that the judgment of the Ohio judiciary is incorrect as a matter of law. Specifi-

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1. In addition to the oral findings which the trial court made at the conclusion of the pre-trial evidentiary hearing, the Ohio trial judge issued express written factual finding. *See* Opinion Re Defendant's Pre-trial Motion to Suppress [Appendix A-1 to Brief Opposing Petition for Certiorari].

cally, respondent argues that admission of his initial confession was in violation of the rule enunciated in *Edwards v. Arizona,* 451 U.S. 477 (1981). Reference to the record and the express state court factual determinations demonstrate the insubstantiality of such argument.[2]

The salient facts underlying respondent's confessions are set forth at length at pages 7-9 of the Petition for Writ of Certiorari. Respondent was initially arrested by Cuyahoga County law enforcement officers for "a distinctly separate investigation." (Respondent's Appendix A-3) Upon being advised of the *Miranda* warnings, respondent requested that he have counsel present before speaking with the Cuyahoga County officials. Respondent's request was honored and he was returned to his jail cell.

Thereafter, Lake County law enforcement officers arrived and informed Cuyahoga County officials of the Lake County charges against respondent. Upon being informed of the arrest warrant, respondent *expressly requested* to talk to the Lake County officials. [TR. T Vol. I, page 91]. The Lake County officers advised respondent of the *Miranda* rights and respondent thereupon gave the first of his inculpatory statements.

Respondent now argues that his request for counsel with respect to the Cuyahoga County charges acted as a blanket prohibition of the waiver of counsel with respect to a wholly *unrelated charge* arising out of a *separate jurisdiction.* Neither *Edwards* nor notions of common sense support such an argument. While it is true that

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2. For present purposes, petitioner will assume that *Edwards v. Arizona, supra,* is fully retroactive and thereby applicable to respondent's case.

Edwards can be read as a per se prohibition against questioning absent an initiation by the accused, such an interpretation is of no import herein.

Respondent requested that counsel be present prior to inquiry concerning the Cuyahoga County charges and such request was honored. However, when thereafter notified of the Lake County charges, respondent asked to speak with the Lake County officers. Nothing in *Edwards* preempts custodial interrogation where the accused requests the opportunity to speak with law enforcement officers.

Respondent has conceeded that the court below failed to follow this Court's directive in *Sumner v. Mata, supra* and respondent's alternate argument against review is simply a convolution of this Court's holding in *Edwards v. Arizona, supra.* As such, the petition for writ of certiorari should be granted.

II. WHETHER AN ERRONEOUS JURY INSTRUCTION REGARDING AN ELEMENT OF A CRIMINAL OFFENSE CAN EVER BE CONSIDERED HARMLESS ERROR WHEN FURTHER INSTRUCTION TO THE JURY ARE CURATIVE OF THE ERROR.

In his brief in opposition to certiorari, respondent simply fails to respond to the second question presented in the petition before this Court. Respondent argues that as an isolated portion at the jury instruction "could" have been interpreted by the jury as alleviating the prosecution of the burden of proof with respect to his individual *mens rea*, such an instruction, *standing alone*,

both constituted a violation of the Due Process Clause of the Fourteenth Amendment and would not be harmless error.

Respondent's argument is nothing but a reiteration of the holding of the court below. Petitioner does not dispute that, if viewed *in isolation*, the instruction in issue arguably constitutes a due process violation prejudicial to the accused. However, the district court found that any error in challenged instruction would clearly be harmless as the jury returned a *separate guilty verdict* as to an *identical factual question* pursuant to a jury instruction that is conceded to be in accord with due process dictates.[3] Neither the circuit court nor the respondent herein has articulated any rationale which disputes the district court finding.

The question presented herein is whether this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979) allows for a finding of harmless error in the above stated circumstances. The circuit court opinion can only be read as a per se proscription against the allowance of a harmless error determination in such circumstances.[4] Such declaration by the court below clearly warrants review by this Court.

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3. To be sure, had the jury returned a not guilty verdict with respect to the second factual determination, the holding of the circuit court would arguably be correct.

4. Indeed, the opinion upon which the circuit court predicated its holding has since been vacated by this Court, albeit on differing grounds. See *Burton v. Bergman*, 649 F. 2d 428 (6th Cir. 1981) *vacated*, _____U.S. _____, 72 L. Ed 2d 478 (1982).

CONCLUSION

The judgment of the Court of Appeals is in conflict with precedents of this Court and, as such, must be reversed.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

RICHARD DAVID DRAKE
Counsel of Record
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-5414

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief to Brief in Opposition to Certiorari have been served on respondent, Jimmy Lee Clark, by forwarding such copies through the office of his counsel, Albert E. Purola, 38052 Euclid Avenue, Willoughby, Ohio 44094, by United States Mail, postpaid, this _____ day of January, 1983. I further certify that all parties required to be served have been so served. Respondent's address is the Southern Ohio Correctional Facility at Lucasville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General